MATH WARMSBECKER

IBLA 91-439 Decided July 15, 1993

Appeal from a decision of the Montana State Office, Bureau of Land Management, rejecting class 1 color-of-title application NDM 80226.

Reversed and remanded.

1. Color or Claim of Title: Generally--Color or Claim of Title: Applications--Color or Claim of Title: Improvements

A BLM decision rejecting a class 1 color-of-title application on the ground that no valuable improvements have been placed on the land will be reversed where the applicant's fencing of the parcel and his noxious weed control program have enhanced the value of the land by promoting its use for grazing.

APPEARANCES: Michael S. McIntee, Esq., Towner, North Dakota, for appellant.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Math Warmsbecker has appealed from an August 2, 1991, decision of the Montana State Office, Bureau of Land Management (BLM), rejecting his class 1 color-of-title application (NDM 80226) for a 40-acre parcel described as the SE¼ NE¼ sec. 6, T. 155 N., R. 75 W., fifth principal meridian, McHenry County, North Dakota.

On June 10, 1991, Warmsbecker filed his application under the Color of Title Act, as amended, 43 U.S.C. § 1068 (1988), claiming color of title to the parcel based on a March 28, 1968, tax deed. He asserted that he had paid taxes on the land for 23 years and had made unspecified improvements on the land, noting that the land, which had not been cultivated, was used as pasture land. Warmsbecker indicated that he first learned that he did not have clear title to the land on September 22, 1990, from BLM.

In a July 25, 1991, memorandum to the Montana State Director, the Dickinson District Manager, BLM, recommended that Warmsbecker's application be denied. He based his recommendation on a July 17, 1991, field

examination of the parcel which had revealed that no structural improvements existed on the land and that, while the property had been fenced along its east and west and part of its south boundaries, it was not fenced along its north boundary, but was included as part of a larger pasture to its north and west.

In its August 2, 1991, decision, BLM rejected the application on the ground that Warmsbecker had failed to meet the requirements of the Color of Title Act because the land had not been cultivated and did not contain valuable improvements.

On appeal, Warmsbecker disputes BLM's determination that the land has not been improved. He explains that the property is pasture and waste land and therefore unsuitable for cultivation, and asserts that his fencing of the parcel, noxious weed control program, and pasture management practices constitute the only improvements possible on the land. In support of his appeal, Warmsbecker has submitted two affidavits in addition to his own. In one affidavit the Director of Tax Equalization for McHenry County, North Dakota, opines that real estate which has been fenced for grazing and sprayed for noxious weeds has been improved over land which has not been so fenced or sprayed. In the other affidavit the State county agent located in McHenry County notes that the poor soil and the leafy spurge noxious weed are among the major problems of land in the county and states his opinion that, since the weed totally destroys the production capabilities of the land if it is not controlled, a weed control program and fencing of the land for grazing constitute definite improvements to the property.

The Color of Title Act, 43 U.S.C. § 1068 (1988), provides in relevant part:

> The Secretary of the Interior (a) shall, whenever it shall be shown to his satisfaction that a tract of public land has been held in good faith and in peaceful, adverse, possession by a claimant, his ancestors or grantors, under claim or color of title for more than twenty years, and that valuable improvements have been placed on such land or some part thereof has been reduced to cultivation, * * * issue a patent for not to exceed one hundred and sixty acres of such land upon the payment of not less than $1.25 per acre * * *.

The method for obtaining patent outlined in subsection (a) of 43 U.S.C. § 1068 (1988) is known as a class 1 claim. 43 CFR 2540.0-5(b).

[1] BLM rejected Warmsbecker's class 1 color-of-title application on the ground that no valuable improvements had been placed on the land because the parcel lacked structural improvements and the fencing failed to completely separate the tract from adjoining property. In order to qualify as valuable improvements satisfying the requirements of the Color of Title Act, the improvements must have existed at the time the application was filed and must enhance the value of the land. John P. & Helen S.

Montoya, 113 IBLA 8, 16 (1990), and cases cited therein. Land can be improved and its value enhanced by removing things from it which impair its value and interfere with its use, as well as by placing things on it to improve it. Ben S. Miller, 55 I.D. 73, 75 (1934). The key consideration is whether the activities claimed as valuable improvements promote the use of the land. Homer Wheeler Mannix, 63 I.D. 249, 252 (1956). See also Virgil H. Menefee, A-30620 (Nov. 23, 1966).

We do not agree with BLM that the failure of the fencing to completely segregate the tract from the surrounding property nullifies the fencing as a valuable improvement. The abstracts of title contained in the record demonstrate that Warmsbecker owns most of the property contiguous to the parcel. In the affidavits submitted on appeal, Warmsbecker avers that he fenced the land and uses it for grazing, and both the Tax Equalization Officer and the county agent opine that such fencing improves the value of the land. Accordingly, we conclude that the record does not support BLM's rejection of the fencing as a valuable improvement.

We also find that Warmsbecker's noxious weed control program qualifies as a valuable improvement. Since Warmsbecker's application did not identify his noxious weed eradication as a claimed improvement, BLM did not consider whether that weed control program qualified as a valuable improvement. The affidavits supplied by Warmsbecker, however, establish that such weed control clearly promotes the use of the parcel for grazing and thus enhances the value of the land for that purpose. See Virgil H. Menefee, supra. Thus, Warmsbecker has fulfilled the statutory requirement of placing valuable improvements on the land.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case is remanded to BLM for further action.

John H. Kelly
Administrative Judge

I concur:

R. W. Mullen
Administrative Judge